Motion to Dismiss Action of April 5, 1965 and Circuit Court Decision on Motion to Dismiss Action

MOTION TO DISMISS ACTION
(Formal Parts Omitted)

NOW COMES The above defendant, Robert C. Kelly, by Lawton & Cates, his attorneys, and the above defendant, Neil A. Woodington, by Immell, Herro, Buehner, DeWitt & Sundby, S. C. his attorneys, both of whom move the court to dismiss this action on the following grounds:

1. That section 189.19 (2) (d) of the Wisconsin Statutes is so vague and indefinite as to be unconstitutional under the due process clauses of Section VIII, Article 1 of the Wisconsin Constitution, and under the 14th Amendment to the United States Constitution.

2. That the activities of the State in conducting the investigation and prosecuting these actions constituted such outrageous misconduct as to be unconstitutional due to violation of the due process clauses of Section VIII, Article I of the Wisconsin Constitution and of the 14th Amendment to the United States Constitution.

3. That the magistrate conducting the preliminary examinations of the defendants did not have jurisdiction to conduct such preliminary examinations because the warrants and complaints were insufficient and did not consequently meet the constitutional requirements of the due process clauses of Section VII, Article 1 of the Wisconsin

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Constitution and the 14th Amendment to the United States Constitution.

Dated: April 5, 1965.

3 DECISION ON THREE MOTIONS OF THE DEFENDANTS TO DISMISS
(Formal Parts Omitted)

Wherever in this decision the Madison American Guaranty Insurance Corporation is referred to, it will be referred to as "MAGIC"; and wherever the Allied Development Corporation is referred to, it will be referred to as "Allied."

The defendants have moved as follows:

1. That the activities of the State in conducting the investigation and prosecuting these actions constituted such outrageous misconduct as to be unconstitutional due to violation of the due process clauses of Section VIII, Article 1, of the Wisconsin Constitution, and of the 14th Amendment to the United States Constitution.

2. That Section 189.19 (2) (d) of the Wisconsin Statutes is so vague and indefinite as to be unconstitutional under the due process clauses of Section VIII, Article 1 of the Wisconsin Constitution and under the 14th Amendment to the United States Constitution.

3. That the Magistrate conducting the preliminary examinations of the defendants did not have jurisdiction to conduct such preliminary examinations because the war-

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rants and complaints were insufficient and did not consequently meet the constitutional requirements of the due process clauses of Section VIII, Article 1 of the Wisconsin Constitution and the 14th Amendment to the United States Constitution.

4 The Information, to which the defendants have entered pleas of not guilty, reads as follows:

(The information was quoted.)

Section 189.19 (2) (d) reads as follows:

"(2) Every director, officer, agent or employe of any issuer and every dealer, agent, investment advisor or other person shall be imprisoned in the state prison not exceeding 5 years, or in a county jail not exceeding one year, or fined not exceeding $5,000, or both, who shall directly or indirectly:

"(d) File or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading;"

MAGIC and Allied are corporations and, at the times involved, were both based in Madison; and, at the times involved, the defendants, Neil A. Woodington and Robert C. Kelly were officers of both corporations. Both corporations had filed applications with the Securities Department of the State of Wisconsin seeking permits authorizing the respective corporations to sell stock to the public. The Securities Department had jurisdiction with reference to the issuance of permits to sell stock; and the Commissioner of Insur-

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ance had jurisdiction with reference to the operation of MAGIC by reason of the fact that it is an insurance corporation.

As a result of various conferences and investigations, the State of Wisconsin has charged that the defendants filed with the Department of Securities an application on behalf of Allied for registration for securities which contained a statement and representation with respect to "cash," and that said defendants knew, or, in the exercise of reasonable care should have known, that the statement with respect to "cash" was false and misleading.

DECISION AS TO MOTION NO. 1

From the testimony taken with reference to this motion, including the various exhibits, it appears that as a result of the application filed with the Department of Securities, and as a result of the application filed with the Insurance Department, investigations by the Sescurities Department of Allied, and investigations by the Insurance Department of MAGIC followed. The then Attorney General and his office joined in the investigations of both Allied and MAGIC; and it also appears that the Banking Department likewise joined as a result of the other investigations.

The then Attorney General and other State officers did not agree on certain procedures and contentions and, as a result, releases to news media were made at various times; and the releases and statements would indicate that the then Attorney General and some of the other officers of

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the State did not agree as to findings and conclusions; and, as a result, the then Attorney General or Deputy Attorney General referred the matter to the District Attorney of Dane County; and the District Attorney of Dane County and the then Attorney General evidently did not agree immediately on what conclusions should be drawn from the investigations and findings.

It also appears that all of this information resulted in a substantial amount of publicity in newspapers and over the radio and by television. It further appears—and the Court takes note of the fact—that a very substantial portion of the publicity took place during the months of September and October, 1964, and that a general election took place on November 2, 1964, in which all state officers and county officers were involved. It likewise appears that the candidate for District Attorney of Dane County on the ticket opposing the then District Attorney made certain releases to the news media with reference to the actions or non-actions of the then District Attorney, and likewise caused to be filed a petition with the Circuit Court of Dane County for the calling of a Grand Jury to investigate the situation.

The exhibits, which consist of newspaper publicity, radio tapes, television tapes, news releases, letters and copies of letters, etc., are too numerous to set forth in detail. It must be noted that the defendants in effect joined in the dispensing of information to be published by news media. They made certain news releases and paid for full-page newspaper ads setting forth their contentions.

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It is fundamental that the state officers and departments, such as the Director of Securities, the Insurance
7 Department, Banking Department and the Attorney General, have the right, power and discretion to cause investigations to be made with respect to matters which come within their jurisdiction and it must also be recognized that the Attorney General is the chief law enforcement officer of the State. It must also be recognized that candidates for public office, running on one political ticket, have the right to criticize the operation of the government by the "ins" who may be candidates for the office on another ticket.

For this Court to make a finding that a state officer, such as any of the officers heretofore mentioned, acted improperly with reference to the matter here involved, would be to, in effect, subject his actions to a judicial determination without giving him his day in court.

This is not a motion to suppress certain evidence, nor is it a motion for change of venue of the trial of the cases. The defendants contend that the actions of the State, as a result of the investigations and prosecution, constitute such misconduct that both of the defendants, Kelly and Woodington, are denied due process of law under the 14th Amendment to the United States Constitution and under Section VIII, Article 1, of the Wisconsin Constitution. Paragraphs 15 and 16 of an affidavit filed by counsel for the defendants read as follows:

> "That the intentional and unnecessary publicity occasioned and generated by the State of Wisconsin in the investigation and prosecution of Robert Kelly

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and Neil Woodington has subjected these men to the
8 hatred, the scorn, the contempt, and the ridicule of their community and without question amounts to a violation of their right to fair treatment and has further interfered with the ability of these persons to receive a fair trial; that Robert Kelly and Neil Woodington were so cognizant of the prejudice generated in their community by the State of Wisconsin that these individuals at a prior proceeding in this case chose to waive the right of trial by jury which is one of our most fundamental rights; no word or deed can be more meaningful; the State unnecessarily and intentionally created an atmosphere where free men could not receive a fair and impartial trial by jury.

"That Robert Kelly and Neil Woodington have suffered irreparable harm occasioned through the unnecessary words and deeds of the State of Wisconsin; that they have been treated inconsistent with the basic requirements of due process of law, i.e., unfairly and in a manner calculated to interfere with their right to a fair trial; that because of this and because of other reasons referred to in paragraph 1 above, Robert Kelly and Neil Woodington request the only relief suitable to such misconduct, dismissal of the charge against them."

The defendants have cited numerous cases which, in the opinion of this Court, are distinguishable from the situation that here exists. Most of these cases involve illegal confessions, illegal searches and seizures, perjury known to be so by the prosecution, and mob rule of the trial, as jus-
9 tifying a dismissal of this case. In the large majority of the cases the Supreme Court of the United States did not

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dismiss the action but ordered a new trial. Where a new trial is ordered, errors that occurred are corrected, and violations of the constitutional rights of the defendants are preserved.

In Frank vs Mangum, 237 U. S. 309, the defendant was convicted in Georgia of murder. He appealed to the Georgia Supreme Court claiming that his constitutional rights had been denied, alleging that public sentiment was so great as to influence the jury. The Georgia Court did not find the evidence sufficient to justify a reversal of the case, and granting of a new trial. The defendant then brought a writ of habeas corpus in the United States District Court, which was denied; and the case was then appealed to the United States Supreme Court. The Court there said:

> "We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term."

The Court further said:

> "The decisions of the Georgia courts in this and other cases show that such disorder is repressed, where practicable, by the direct intervention of the trial court and the officers under its command; and that other means familiar to the common-law practice, such as postponing the trial, changing the venue, and granting a new trial, are liberally resorted to in order to protect persons accused of crimes in the right to a fair trial by an impartial jury. The argument for appellant amounts

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to saying that this is not enough; that by force of the 'due process of law' provisions of the 14th Amendment, when the first attempt at a fair trial is rendered abortive through outside interference, the state, instead of allowing a new trial under better auspices, must abandon jurisdiction over the accused and refrain from further inquiry into the question of his guilt.

"To establish this doctrine would, in a very practical sense, impair the power of the state to repress and punish crime; for it would render their court's powerless to act in opposition to lawless public sentiment. The argument is not only unsound in principle, but is in conflict with the practice that prevails in all of the states, so far as we are aware."

The defendants also rely on the case of State vs Cory, 382 Pacific, (2d) 1019, which was a State of Washington case. In that case the Sheriff was found guilty of eavesdropping on a conference held by the defendant with his attorney. The trial had been held and the defendant had been found guilty. The court dismissed the case by virtue of the improper action of the sheriff in eavesdropping with reference to the lawyer-client conference. The case is distinguishable from the situation at hand. The evidence obtained by the prosecution by eavesdropping was of such a nature that the prejudice resulting to the defendant could
11 not be cured by a new trial and the reasoning there applied cannot be applied to the situation at hand.

The defendants in the instant case have not been denied due process of law if they can be granted a fair trial by jury. The situation is that both defendants have thereto-

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fore, in open court, waived the right of trial by jury. In the affidavit heretofore referred to, by counsel for the defendants, the following is stated:

> "That Robert Kelly and Neil Woodington were so cognizant of the prejudice generated in their community by the State of Wisconsin that these individuals at a prior proceeding in this case chose to waive the right of trial by jury which is one of our most fundamental rights; no word or deed can be more meaningful; the State unnecessarily and intentionally created an atmosphere where free men could not receive a fair and impartial trial by jury."

This Court recognizes that neither of the attorneys who now appear for the defendants were present in court when the defendants moved for a waiver of trial by jury and the State consented thereto. The Court likewise recognizes that one of the counsel was retained after this occurred. It could very well be that by virtue of the publicity which has taken place that it would be extremely difficult to impanel a jury in Dane County which would be fair and impartial. It is also conceivable that it might be difficult to impanel a fair and impartial jury in a county which adjoins Dane County. Prior to March 1, 1965, it was the law in Wisconsin that if the court, in a criminal case, found
12 that community prejudice existed in a county so that a fair and impartial jury could not be impaneled, that the Court could then exercise its discretion and transfer the trial of the action to an adjoining county. However, effective as of March 1, 1965, it is the law in Wisconsin that if the Court finds community prejudice to exist so that it

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would be extremely difficult to impanel a jury in a criminal case which would be fair and impartial, that the Court can then exercise its discretion and transfer the venue of the action—that is, the trial—to any county in the State where community prejudice does not exist. This Court is satisfied that there are counties in the State of Wisconsin where a fair and impartial jury could be impaneled for the trial of this action. The Court is likewise satisfied that if the record remains as it is, whereby the defendants and each of them have waived trial by jury, that a fair and impartial trial can be held before the Court.

It is the considered judgment of this Court that the defendants have not been denied due process of law and that the actions of the State of Wisconsin have not been of such a nature as to constitute a violation of the due process clauses of Section VIII, Article 1 of the Wisconsin Constitution and of the 14th Amendment to the United States Constitution.

It therefore follows that Motion Number 1 must be denied.

13 *DECISION AS TO MOTION NO. II*

The defendants contend that the negligence clause of Section 189.19 (2) (d) of the Statute is void for vagueness within the meaning of the due-process clause for the 14th Amendment because the standard of liability under the circumstances is wholly indeterminate and the conduct behind the statutory referrent "misleading material statement" is also unconstitutionally vague. Moreover, a portion of the

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mens rea clause the conduct behind the statutory referrent "misleading material statement" is unconstitutionally vague. Therefore, because the negligence clause is wholly vague and because a portion of the mens rea clause is partially vague, no prosecution may proceed under the terms of either clause and the information drafted pursuant to these portions of the statute must be dismissed.

The defendants contend, among other things, that subdivision (d) of Section 189.19 (2) of the Statute is so vague and indefinite that prosecution cannot follow. The Statute says that the defendants shall be punished if they file or cause to be filed with the department any statement or representation of a material fact which statement or representation he knows or, in the exercise of reasonable care, should know to be false or misleading.

The defendants contend that the statute is void for vagueness. There are numerous cases that deal with the use of the word "reasonable" in criminal statutes and the Court has considered all of those cited by counsel.

14 In the case of United States vs. Ragen, 314 U. S. 513, the defendants were charged with the wilful evasion of the tax laws. The statute provided that a deduction was permitted for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered." Under the statute dividends were not an allowable deduction. The defendants were charged with a scheme to evade corporation income taxes by paying dividends to

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stockholders and calling them commissions. Each one of the persons receiving such commissions had in fact done some work for the company; therefore the jury had to decide if the commissions were excessive or if they were reasonable allowances. The court held that the statute was constitutional and was not vague and indefinite. It said:

> "If, as the opinion below suggests, the only question that can properly be submitted to the jury is whether the entire deduction is fabricated, an unconscionable taxpayer can immunize himself from the criminal sanctions for tax evasion by the simplest of expedients. He need only find a legitimate item of deduction and then pad it as much as his purpose requires. By transforming the question 'Should any deduction have been made?' into 'Was the deduction made in excess of a reasonable allowance?' he can, if the theory accepted below be correct, largely destroy the deterrent effect of a penal statute passed by congress.
>
> "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine the question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."

In Commonwealth vs Reilly, a Massachusetts case, 142 N. E. 915, the constitutionality of the following statute was involved:

> "Any person who, with intent to sell or in any way dispose of merchandise, securities, service, etc. . . . makes, publishes, disseminates, circulates or places before the public . . . in a newspaper or other publication . . . an advertisement . . . which advertisement contains

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any assertion, representation or statement of fact which is untrue, deceptive or misleading, and which such person knew, or might on reasonable investigation have ascertained to be untrue, deceptive or misleading, shall be punished . . ."

The Court held that the statute was constitutional and did not violate the void for vagueness standard of the 14th Amendment. The Court said:

"The common law has established many tests for separating criminal from noncriminal conduct based on what a jury may think is reasonable. Self-defense as a justification in cases of homicide is made out by proof that the defendant had reasonable cause to believe, and in truth did believe, that it was necessary to strike in order to protect his own person, and that the mortal blow was given solely for that purpose."

16 The Court further said:

"Definitions of negligence not infrequently referred to the conduct of a 'reasonable man' as one of its elements . . . the person of ordinary caution and prudence often embodied in definitions of negligence is but another way of describing the reasonable person."

The Court further said:

"The statute here assailed prohibits as an inducement to business transactions the publications of untrue, deceptive or misleading statements or representations of fact. If the statute had stopped here, it would have been invulnerable under many decisions upholding statutes which forbid the doing of some act wholly

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apart from any intent . . . the present statute goes further and requires as an element to be found, before guilt can be established, either actual knowledge of the untrue, deceptive or misleading nature of the statement or representations by the defendant, or that such knowledge might have been acquired by him on reasonable investigation. It is manifest that here it is a fixed and ascertainable standard of guilt and that adequate information is given as to the nature and cause of the acts set forth in the accusation."

The use of the terms "reasonable care, false, misleading," etc., are words that have a common meaning and their use does not cause the statute to be unconstitutional for vagueness. In Coplin vs United States, 301 U. S. 703, [sic] the Court had this to say:

17 "Subjecting the words of section 77 Q (a) (2), upon which Count IX is specifically based, to critical scrutiny, we find no fatal ambiguity or indefiniteness, such as might prove a pitfall to any person, in the language of the appellants, 'attempting to obey the law.' No honest and reasonable citizen could have difficulty in understanding the meaning of 'untrue,' 'material fact,' 'any omission to state a material fact,' 'in the light of the circumstances under which they were made,' or 'misleading.' All these terms, it is true, call for interpretation in accordance to the facts of a given case. So do the terms 'malice,' 'probable cause,' 'self-defense,' 'negligence,' 'fraud,' 'duress,' 'justification,' and thousands of other expressions well established in the law.

"Isolated from their setting, any of the foregoing terms might be said to be 'indefinite' or 'uncertain'; but 'in the light of the circumstances under which' they

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are used, their meaning is clear enough to the reasonable and well-intentioned citizen. 'That is certain which may be rendered certain.' "

The Legislature has determined that in filing a registration statement with the Securities Department, the applicant shall be held to a standard of a reasonable man, which is a standard known and understood not only in the law but by every citizen. This is an ascertainable standard and a standard which may be used constitutionally in a criminal statute.

Due consideration has been given to the defendants'
18 argument with reference to the mens rea clause and with reference to their contentions as to blameworthiness. The Court being satisfied that the Statute is constitutional and does not deny the defendants due process of law within the 14th Amendment to the Constitution of the United States, nor under Section VIII, Article 1, of the Wisconsin Constitution, it follows that Motion Number 2 must be denied.

DECISION AS TO MOTION NO. III

The defendants contend that the Magistrate conducting the preliminary examinations of the defendants did not have jurisdiction to conduct such preliminary examinations because the warrants and complaints were insufficient and did not consequently meet the constitutional requirements of the due-process clauses of Section VIII, Article 1 of the Wisconsin Constitution and the 14th Amendment to the United States Constitution.

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The warrants were never served on the defendants by reason of the fact that the defendants surrendered voluntarily to the jurisdiction of the Magistrate; and, by reason thereof, this Court is of the opinion that the motion must be denied.

The District Attorney is hereby directed to prepare an order for the Court's signature denying each of the motions.

Dated: April 22, 1965.